Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

80-1948
No.

IN THE

Supreme Court of the United States

SPRING TERM, 1981

FRANK GROOM KIRTZ, and MARY JANE KIRTZ,
Petitioners,

vs.

BLANTON WIGGIN, ERMA WIGGIN, ADVANCED INSTRUMENTS, INC., A.I. COMPANY, INC., a/k/a ADVANCED INSTRUMENTS, INC., and H-T-L INSTRUMENTS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

FRANK GROOM KIRTZ, and
MARY JANE KIRTZ, pro sese
4530 Pershing
St. Louis, Mo. 63108
(314) 361-1200

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

CONSTITUTIONAL QUESTIONS PRESENTED

1. Did the Court err in denying petitioners their rights to due process and the equal protection of the law, then there had never been a hearing of the Motion to Dismiss, by refusing to hear argument or any case law, and the Court insisted that petitioners settle for a "token" amount based upon a fictitious "judgment" fraudulently asserted orally by respondents, and upon refusal dismissed the Complaint and taxed costs against the petitioners?

2. Did the court err in denying petitioners their rights to due process and the equal protection of the law, by dismissing petitioners' Count 16 *without prejudice,* after five years, rather than remanding to the district court for an Answer and a hearing on the merits?

PARTIES INVOLVED

Petitioners, citizens of the state of Missouri, were minority stockholders owning 28% of a Missouri corporation, Med-Science Electronics, Inc. Respondents Blanton and Erma Wiggin, citizens of the state of Massachusetts, were the majority shareholders, principal Officers and Directors of said corporation.

The other respondents are all "dummy" corporations owned entirely by Blanton and Erma Wiggin, and serving as "conduits of title" for the fraudulent transfer of the assets and the stock of Med-Science Electronics, Inc., by Blanton and Erma Wiggin to themselves.

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Respondents.

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INTRODUCTORY STATEMENT

Petitioners, Frank and Mary Jane Kirtz, respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on Feb. 5, 1981 (Appendix A). Petition for Rehearing en banc was timely filed and denied summarily on Feb. 24,

1981. This petition for certiorari was filed within 90 days of said denial. This Court's jurisdiction is invoked under Rule 10b-5 of the Securities and Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b) and is also based upon diversity of citizenship.

STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States concerning abridgement of of petitioners' rights to due process and their rights of equal protection of the law, together with Rule 10b-5, Securities and Exchange Act of 1934, §10b, 15 U.S.C.A. §78j(b).

STATEMENT OF THE CASE

In its Opinion the Court of Appeals stated (Appendix A, page A-2, paragraph 3, line 3):
"It (the Court) suggested that the matter might be resolved if the plaintiffs would pay a 1971 judgment against them, together with accrued interest to the defendants and that, in turn, Advanced Instruments, Inc., a corporation controlled by the defendants, would pay a judgment against it in favor of the plaintiffs, together with the accrued interest thereon. The suggestion of the Court was accepted by the appellees and rejected by the appellants; thus, no settlement in the matter was achieved."

The Court was deliberately misinformed. THERE WAS NO JUDGMENT AGAINST PLAINTIFFS. There *never* has been. The defendants could not offer or file any evidence of such a "judgment", *since none exists.* They merely asserted orally what the Opinion states. The Court would hear nothing from plaintiffs, and there was *no oral argument.* Because plaintiffs refused a "set-off" of the *fictitious* "judgment", the Court taxed costs against the plaintiffs and dismissed their Complaint, denying them due process and the equal protection of the law.

The respondents, Blanton and Erma Wiggin, the majority shareholders and principal Officers and Directors of Med-Science Electronics, Inc., a Missouri corporation, transferred all the various assets of the company to themselves, through their "dummy" corporations, the other respondents.

Blanton and Erma Wiggin signed and sent through the interstate mails for filing with the Secretary of State of Missouri in 1973, an Agreement and Plan of Merger, contracting "to pay promptly" the "fair value" of the minority shareholders' holdings, to be determined by a Missouri court. The copy sent by the mails to the Secretary of State of Missouri was approved by the Secretary, who thereupon approved the dissolution by Blanton and Erma Wiggin of Med-Science Electronics, Inc., the Missouri corporation. Another copy of this Agreement and Plan of Merger was sent through the mails to the petitioners as part of the scheme to deceive relative to the sale of the stock.

The petitioners, minority shareholders, have been paid *nothing* for their 22,500 shares. The Missouri Court determined their value to be $75,424.00, plus interest from 1973 (the date of the merger), in a decision dated Feb. 22, 1977. Respondents have paid nothing.

The petitioners have been cheated out of their shares. Blanton and Erma Wiggin used the Agreement as a "manipulative device" or "scheme" employing means of interestate commerce to deceive petitioners, "in connection with the purchase or sale of securities", thereby violating Rule 10b-5 of the Securities and Exchange Act of 1934, and by paying nothing for the 22,500 shares.

The respondents deliberately misinformed the Court by stating orally that they "owned a 1971 judgment" against petitioners. Upon that fictitious assertion, the Court of Appeals insisted on a "set-off" (see Apendix A, page A-2, third paragraph).

Respondents own *no judgment* against petitioners.

The Court of Appeals would brook *no discussion* of the briefs, or of any case law. The Court insisted on "token" settlement. Petitioners were threatened with immediate dismissal unless they accepted the "token" offer of less than $5000.00, and taxation of costs against them.

When petitioners refused the offer, their Complaint was dismissed without reason, and costs taxed against petitioners, contra to the decision of the Supreme Court in *Delta Air Lines Inc.* v. *August,* 101 S.Ct. 346.

The only question before the Court of Appeals was whether the petitioners had stated a cause of action upon which relief can be granted under Rule 10b-5, Securities and Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

The opinion (Appendix A) filed Feb. 5, 1981, violates Rule 17 of the Rules of the Supreme Court in several ways:

The opinion is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit: *Falls* v. *Fickling et al.,* 621 F. 2d 1362, which states, ruling on the same question:

> "This Court has held that there are three basic elements. . . in 10b-5 actions: (1) conduct by the defendants proscribed by the rule; (2) a purchase or sale of securities by the plaintiffs 'in connection with' such proscribed conduct; and (3) resultant damages to the plaintiffs. *Sargent* v. *Genesco, Inc.,* 492 F. 2d 750, 759 (5th Cir 1974); see *Woodward* v. *Metro Bank of Dallas,* 522 F. 2d 84, 93 (5th Cir 1975)."

The present case meets fully these three elements.

The opinion (Appendix A) is also in direct conflict with the United States Court of Appeals for the Fifth Circuit in the case of *Dupuy* v. *Dupuy,* 511 F 2d 641 (5th Cir 1975) and 551 F 2d 1005 (5th Cir 1977), a leading case on stating a cause of action under §10b-5 in securities fraud.

The conduct of the Court of Appeals herein "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for exercise of this Court's power of supervision" by issuance of the writ of certiorari, Rule 17(a) of the Supreme Court.

That departure "from the accepted and usual course of judicial proceedings" consisted in dismissal of the Complaint without any consideration by the lower Court or the Court of Appeals. At the Court of Appeals "Hearing" of Oct. 16, 1980, *no oral argument was permitted pertaining to the pleadings or the Briefs;* and the issue on appeal (as to whether the Complaint stated a cause of action upon which relief could be granted) was *never* presented or discussed. Discussion *only* on "token" settlement was permitted. When plaintiffs refused the token settlement, their cause was dismissed, as previously and emphatically threatened. Costs were taxed against plaintiffs.

Petitioners were peremptorily summoned to a meeting on Nov. 13, 1980, in Judge Heaney's chambers. Their attorney, who did not appear, had warned petitioners that they "might not be permitted to speak", together with other admonitions. No "hearing" was held, and said attorney has withdrawn from the case.

Application for the writ is based on the Court of Appeals' denial of petitioners' rights under the 5th and 14th Amendments to the Constitution of the United States to due process and the equal protection of the law.

On the second page, A-2, paragraph 3, line 3 of the opinion (Appendix A) the Court of Appeals states:

> "It (the Court) suggested that the matter might be resolved if the plaintiffs would pay a 1971 judgment against them, together with accrued interest thereon to the defendants, and.."

The Court was *purposely misinformed* by respondents' attorneys, who had no judgment to cite or show the Court.

There is not now, and *never* has been any judgment against the plaintiffs, contrary to the statement by the Court in its Opinion (Appendix A, page A-2, third paragraph).

REASONS FOR GRANTING THE WRIT

I

The Opinion Of The Court Of Appeals "Conflicts With Applicable Decisions Of This Court" (Rule 17[c] Of The Supreme Court).

A compelling reason for granting this writ is that the opinion of the Court of Appeals herein is in conflict with applicable decisions of the Supreme Court. The dismissal of the Complaint violates the principles of construction set out as follows:

"Following the simple guide of Rule 8 (f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley et al.* v. *Gibson et al.*, 355 U.S. 41, at 78 S.Ct. 99, 103, 2 L. Ed. 2d 80 (1957).

II

"The Court Of Appeals" Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court" (Rule 17[c] Of The Supreme Court.) Because It Affects *Adversely* A Large Class Of Citizens: The Minority Shareholders Of The United States.

Another compelling reason for granting this writ is that irreparable damage is being done to the corporate business structure of these United States by the use of a widely taught and practised fraud technique used herein.

The fraudulent merger technique, "without a lawful business purpose" used herein, is taught in a recently published book (Appendix B) offered and sold to lawyers and businessmen.

This book is entitled "*SQUEEZE-OUTS*"; it was written by Bertil Westlin, J.D., (a member of the New York Bar and the Legal Editor of "*BOARDROOM REPORTS*"). Published by the Council for Business Research, Inc., it describes in detail, according to its advertisement, "89 WAYS BUSINESS ASSOCIATES ARE SQUEEZED OUT". Copy of the title page of this book, together with copies of the pertinent pages 64 through 67 are attached as Appendix B.

The Court's attention is particularly directed to Appendix B, pp. 64 through 67, for its description of "Upstream-" or "Up the River Mergers and Consolidations". The author points out his most interesting conclusion on page 67, at line 9 (Appendix B, page A-6):

> "Whether or not federal securities laws' principles, particularly the antifraud provisions found in SEC Rule 10b-5, may be invoked to help the minority in these situations is still open to question."

In the present case two so-called "phantom mergers" with "dummy" corporations (owned entirely by respondents Blanton and Erma Wiggin) were employed by them in their schemes to circumvent SEC Rule 10b-5.

Petitioners do not seek to outlaw "upstream mergers" as described with "phantom or dummy corporations". They petition for a ruling that these mergers are subject, as every interstate security transaction is, to the requirements of Rule 10b-5 (see *Dupuy* v. *Dupuy, supra*). This book "SQUEEZE-OUTS" (Appendix B, page A-6) states on its page 67, in the quotation *supra,* that "whether or not...antifraud provisions found in SEC rule 10b-5, may be invoked ...is still open to question."

The reason for the wide precedential value and imperative public importance of this case is that there are more than 30,000,000 stockholders in the United States, most of whom are "minority stockholders" who may be at some time affected by the ruling in this case.

III.

The Complaint Clearly States A Cause Of Action Upon Which Relief Can Be Granted, Otherwise There Could Be No Reason For An Offer Of Settlement, And So Marked A Departure "From The Accepted And Usual Course Of Judicial Proceedings" By The Court Of Appeals In Connection Therewith, "As To Call For This Court's Power Of Supervision (Under Supreme Court Rule 17[a])

Counts 1 through 13 of the Complaint detail the various fraudulent interstate transactions, directly or through their "dummy" corporate respondents by which Blanton and Erma Wiggin transferred as many portions of the property of Med-Science Electronics, Inc., as they could, to themselves, to lower the "fair value" of said corporation's stock. These transactions were disguised in the Minutes of the Board of Directors, and entered in deceptive forms on the financial statements mailed to petitioners in connection with the sale of the securities, thereby violating §10b-5, *supra.*

Counts 14 and 15 of the Complaint detail §10b-5 violations by a local agent representing respondents Blanton and Erma Wiggin. Said agent was paid with corporation funds disguised as "wages" to the agent's son, said "wages" were in excess of the sums drawn yearly by Blanton Wiggin as President and majority stockholder in total control of the corporation.

The Counts 14 and 15 meet fully the requirements of *Falls* v. *Fickling,* and *Conley* v. *Gibson, supra.*

Count 16, directed to payment for petitioners' stock, was filed timely, *by leave of Court, before* defendants-respondents filed an an Answer (as they never have), in full compliance with the Rules of Federal Procedure. Count 16 properly asserts a cause of action upon which relief can be granted, as is obvious from its dismissal by the Court of Appeals "*without prejudice*".

However, dismissal without prejudice will compel petitioners to refile Count 16 *after* the tolling of the statute of limitations for common law fraud, thereby denying petitioners the protection afforded by §10b-5 against such fraudulent securities transactions.

For the first time the Constitutional Questions were raised by the Court of Appeals' departure "from the accepted and usual course of judicial proceedings" (Rule 17[a] of the Supreme Court) by that Court's conduct of the October 16, 1980, "Hearing" and again at its November 13, 1980, "meeting" in chambers. Plaintiffs were repeatedly threatened with dismissal and taxation of costs if they did not accept a "token" settlement. They were not allowed to speak.

At both unjudicial "proceedings" the Court of Appeals for the Eighth Circuit denied the petitioners any hearing on the *only question on appeal:* whether the Complaint states a cause of action upon which relief can be granted. This question was never heard before the district court, which refused to hold a hearing on said question. Similarly the Court of Appeals would not hear any discussion of that issue.

By its *unprecedented* actions the Court of Appeals for the Eighth Circuit has denied the petitioners their rights to "due process" and "equal protection of the law" under the 5th and the 14th Amendments to the Constitution of the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

Frank Groom Kirtz, and
Mary Jane Kirtz, pro sese.
4530 Pershing
St. Louis, Mo. 63108

May 15, 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1073

Frank Groom Kirtz and
Mary Jane Kirtz,
Appellants,

v.

Blanton Wiggin; Erma Wiggin;
Advanced Instruments, Inc.,
A. I. Company, Inc., a/k/a
Advanced Instruments, Inc.
and H T L Instruments, Inc.,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: October 16, 1980

Filed: February 5, 1981

Before HEANEY, ADAMS,* and STEPHENSON,
Circuit Judges.

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*The HONORABLE ARLIN M. ADAMS, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

PER CURIAM.

This matter is before the Court for the second time. When it was first here, we considered the district court's dismissal of all of the counts of a thirteen-count complaint. We upheld the dismissal with respect to three of the thirteen counts but reinstated the remaining counts and remanded to the district court for further consideration. *Kirtz* v. *Wiggin*, No. 77-1351, filed December 30, 1977 [566 F.2d 1179 (8th Cir. 1977).]

On remand, the complaint was again amended by the plaintiffs. The district court carefully considered the defendants' motion to dismiss the amended complaint of sixteen counts for failure to state a claim and for summary judgment. It held that judgment should be entered in favor of the defendants and against the plaintiffs on Counts 1 through 15, and that Count 16 should be stricken without prejudice.

During the course of oral argument and thereafter, this Court encouraged the parties to settle this lengthy litigation. It suggested that the matter might be resolved if the plaintiffs would pay a 1971 judgment against them, together with accrued interest thereon to the defendants and that, in turn, Advanced Instruments, Inc., a corporation controlled by the defendants, would pay a judgment against it in favor of the plaintiffs, together with the accrued interest thereon. The suggestion of the Court was accepted by the appellees and rejected by the appellants; thus, no settlement in the matter was achieved.

After oral argument and careful consideration of the records and briefs, we affirm the judgment of the district court on the basis of its well-reasoned opinion. *Kirtz* v. *Wiggin*, 483 F.Supp. 148 (D. E.D. Mo. 1980). Costs will be taxed to the appellants.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

SQUEEZE-OUTS

How to Separate from Your Business Associates... and How To Protect Your Interests

by Bertil Westlin, J.D.

Member of the New York Bar
Legal Editor/*BOARDROOM REPORTS*

Council for Business Research, Inc.
500 Fifth Avenue
New York, New York 10036

[64] UP THE RIVER WITH MERGERS AND CONSOLIDATIONS

. . . . . .

"The more common type of merger in squeeze-out situations, however, is not the short-form merger but one in which a merger is effected with a corporation in which the majority shareholders, or individuals within their control, have a personal interest. It may be an existing corporation currently engaged in the active conduct of a business or it may be a dummy corporation set up by the majority shareholders. Such use of a dummy corporation was upheld in one case as serving a lawful business purpose against charges of fraud and unfairness. *Matteson* v. *Ziebarth,* 242 P. 2d 1025, 40 Wash. (1952). But a more recent case viewed such a use of a dummy corporation as an illegal squeeze-out technique. In this case, the Fifth Circuit Court of Appeals said that:

> "Where a corporation is unable, because of well-recognized contract law, to eliminate a minority stockholder by simply adopting a by-law or voting to purchase his stock, its majority stockholders cannot accomplish **[65]** the same purpose by setting up a second corporation wholly owned by them whose sole purpose is to enable it to take advantage of the merger statutes which, when utilized by two existing corporations, may, as a part of the merger procedure, result in the elimination of a dissenter." [Bryan v. Brock & Blevins Co., Inc., CA-5, CCH Securities Law Reporter #94,414 (2/27/74).]

In reaching its conclusion, the Appeals Court noted the earlier finding of the trial court that there was no "business purpose" for the merger and said that, "In the absence of such business purpose [the dummy corporation] was purely a sham created to circumvent the rule of law that prohibits a majority of stockholders of a corporation, absent a charter provision as to the contrary, to force the minority interests to surrender their stock holdings."

Because of its decision on these grounds, it was unnecessary for the court to consider whether or not there might also have been a violation of the federal securities laws — specifically, SEC 10b-5, the anti-fraud rule. However, the court also noted that the merger had been characterized as a "device, scheme or artifice to defraud" the minority shareholder of his stock. This, on the face of it, would certainly bring the case within the provisions of SEC Rule 10b-5. [More on this can be found in Chapter VII.]

To protect shareholders objecting to some fundamental change in their corporation, state laws generally give them the right to demand that the corporation pay them for the appraised value of their shares. The laws may vary from state to state as to what [66] proposed changes in the corporation give rise to this right and other matters concerning it. The basis of valuation of shares, for example, may be formulated differently—some refer to value; others fair value, fair market value and so forth. There may be variations, too, as to the time when value is determined, who is to make the determination, the conditions which must be fulfilled before payment may be demanded, and various other details.

In a number of states the appraisal remedy is exclusive; that is, the dissenting minority shareholders must either go along with the proposed change or accept cash for their shares and get out. However, as we've indicated, the remedy may not be deemed exclusive where the dissenting shareholders are able to show that the change is not being sought for a proper business purpose but is being used as a means of effecting a squeeze-out.

All states, except West Virginia at last count, give dissenters appraisal rights in the case of a merger. If a proposed merger, then, is unpalatable to the minority, the appraisal procedure may force the dissenters to either go along with the merger or give up their interest in the company. The latter, of course, is what the majority bent upon a squeeze-out would prefer. A

merger move by the majority isn't easy to stop in most cases. In situations where the majority has set up a dummy corporation, as took place in *Bryan* v. *Brock & Blevins Co.*, Inc., it may be possible for the minority to stop the move, which is what the court ruled in that case. In a dummy corporation situation, the alleged business purpose of the move is quite obviously open to question. But where the proposed [67] merger is with an effectively operating corporation, it's difficult for the minority to prevent the change. If they are to succeed at all on the basis of corporate law principles, they must show a breach of fiduciary obligations on the part of the directors and controlling stockholders, lack of business purpose and/or some form of fraud. These elements may be difficult to prove. Fraud is usually hard to document. Questions involving business purpose touch upon matters of business judgment, an area in which courts are reluctant to act. Whether or not federal securities laws' principles, particularly the antifraud provisions found in SEC Rule 10b-5, may be invoked to help the minority in these situations is still open to question. Certainly, if it can be shown that the purpose of the majority is to use the merger as a means of squeezing out the minority, the argument may be advanced that the merger is a device to defraud the minority by pressuring them to sell their shares via the appraisal procedure. But there still is a problem of proof. However, proof of fraud under Rule 10b-5 may be easier than proof of so-called common law fraud, since proof of *intent* to defraud may not be required and the requirement of reliance (i.e. defrauded party relied on representations of defrauder) needed in common law fraud may be whittled down.

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SPRING TERM, 1981

FRANK GROOM KIRTZ, and MARY JANE KIRTZ,
Petitioners,

vs.

BLANTON WIGGIN, ERMA WIGGIN, ADVANCED INSTRUMENTS, INC., A.I. COMPANY, INC., a/k/a ADVANCED INSTRUMENTS, INC., and H-T-L INSTRUMENTS, INC.,
Respondents.

SUPPLEMENTAL APPENDIX TO Petition For A Writ Of Certiorari To The United States Court of Appeals For the Eighth Circuit

---

FRANK GROOM KIRTZ, and
MARY JANE KIRTZ, pro sese
4530 Pershing
St. Louis, Mo. 63108
(314) 361-1200

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1980

No. 80-1073

Frank Groom Kirtz, *et al.*,
Appellants,

vs.

Blanton Wiggin, *et al.*,
Appellees.

Appeal from the United States
District Court for the
Eastern District of
Missouri.

The Court, having considered appellant's pro se petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 24, 1981

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-481C (B)

Frank Groom Kirtz and
Mary Jane Kirtz,
Plaintiffs,

vs.

Blanton Wiggin, Erma
Wiggin, *et al.*,
Defendants.

JUDGMENT

The Court having this day entered its MEMORANDUM herein, NOW THEREFORE in accordance therewith and for the reasons therein stated,

IT IS HEREBY ORDERED and ADJUDGED that plaintiffs take nothing and that Counts I through XV be and the same are hereby dismissed with prejudice and that Count XVI be stricken without prejudice.

Dated this 15th day of January, 1980.

/s/ John K. Regan
United States District Judge

MEMORANDUM

In this action pending since May 26, 1976, defendants have moved to dismiss plaintiffs' fourth amended complaint for failure to state a claim and for summary judgment.

In an earlier stage of this case we dismissed plaintiffs' second amended complaint on various procedural grounds. In an unpublished opinion in *Kirtz* v. *Wiggin*, 566 F.2d 1179 (8 Cir. 1977), the Court of Appeals reversed in part and affirmed in part, expressly disclaiming any attempt to consider the substantive sufficiency of the allegations of the complaint, although noting that plaintiffs' claims, "as articulated in their complaint, rest precariously on the outer fringes of cognizable legal theories." The complaint we dismissed contained thirteen claims. The present complaint contains sixteen.

Quoting from the Court of Appeals opinion: "The Kirtzes, residents of Missouri, were the sole minority stockholders of Med-Science Electronics, Inc., a Missouri corporation, until August 1973, when that company was merged into Advance(d) Instruments, Inc., a Massachusetts corporation. Blanton and Erma Wiggin, residents of Massachusetts, controlled the majority of the stock of both companies and were the directors and officers of Med-Science. The Kirtzes allege that the Wiggins, through various self-dealing transactions and improper accounting devices, diverted corporate funds and fraudulently reduced the book value of Med-Science so that Advanced Instruments could purchase the company at less than its true worth." As noted by the Court, the present suit "is one in a long line of legal disputes arising from the Kirtzes' relationship with Med-Science." Two of these cases "culminated in the disbarment of Kirtz by the Supreme Court of Missouri."

Plaintiffs, who objected to the merger prior to the meeting of the stockholders of Med-Science and made a written demand for payment of the "full value" of their shares, thereafter filed suit in the Circuit Court of the City of St. Louis under Section 351.455 RSMo., seeking judgment for such amount as the court should determine to be the "full value" of their shares as of the day prior to the date the vote on merger was taken, together with interest thereon to date of judgment. Following a full-scale

trial of that action,[1] judgment was entered awarding plaintiffs $62,100 as the "full value" of their minority Med-Science stock, and interest of $13,424. Plaintiffs were ordered to deposit with the court an assignment of their stock to be delivered upon the payment by defendants of the sums awarded. The state court judge found that the Med-Science stock had a value of $2.76 per share. On plaintiffs' appeal the judgment was affirmed. *Kirtz* v. *Advanced Instruments, Inc.*, Mo. App. 1979, 581 S.W.2d 868. The record in that case, containing the trial transcript, is before us on the motion for summary judgment.

In our consideration of the sufficiency of the fourth amended complaint and the evidence relating thereto, we start from the premise that the Missouri Supreme Court's finding[2] that "Kirtz had been guilty of gross, reprehensible fraud in performing certain alleged acts in seeking to obtain control of Med-Science and in converting certain shares of stock belong to (Burlis)" in no way affects or precludes plaintiffs' ability to recover for any later fraud which may have been perpetrated on *them* by the Wiggins.

Count I of the present complaint alleges that (at some unspecified time prior to the merger) $140,443 of Med-Science funds was paid to Advanced Instruments, Inc. (a corporation wholly owned by the Wiggins) as commissions for the sale of Med-Science products pursuant to a contract appointing Advanced Instruments as exclusive sales agent; that plaintiffs were unaware of the relationship between the two corporations until

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[1]The present suit was filed shortly before the State Court action was tried.

[2]*Gieselman* v. *Stegeman*, Mo. 1971, 470 S.W.2d 522, 523; *Gieselman* v. *Stegeman*, Mo. 1969, 443 S.W.2d 127; *In re Kirtz*, Mo. 1973, 494 S.W.2d 342.

1975;[1] and that as a result of the payments of the sales commissions, the value of plaintiffs' 28% stock holding was diluted to the extent of 28% of the payments, for which amount, together with $50,000 punitive damages judgment is sought. In effect, Count I attempts to state a claim for breach of the Wiggins' fiduciary relationship based on the charge that for practical purposes they were dealing with themselves. Parenthetically, we note that there is no claim that the sales commissions were not in fact earned nor that they were excessive. Assuming, however, that the Wiggins conduct resulted in a wrongful depletion of corporate assets, it is clear that plaintiffs would have no individual or personal, as distinguished from a derivative, claim with respect thereto.

The situation here presented is wholly unlike that in *Gieselman* v. *Stegeman, supra,* where the wrongs committed by Kirtz resulted in a *direct* injury to the plaintiffs therein. As the Missouri Supreme Court stated (443 S.W.2d at 131): "Stockholders may maintain an action on an individual basis, as distinguished from a derivative action, against directors, officers, or others for the redress of wrongs constituting a *direct* fraud upon them, as in the case where wrongdoers by fraud have seized control of the corporation from the complaining corporation ... Another rule ... gives to a stockholder to whom an erring director or officer owes a *special* fiduciary duty the right to maintain an individual action."

In *Gieselman,* Kirtz, as Burlis' longtime friend, adviser and attorney, occupied a position of special trust and confidence in

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[1]As filed, the date was alleged to be 1974. Following the filing of defendants' motions and memorandum in support thereof which, *inter alia,* argued that on the face of the pleading, limitations had run, plaintiffs amended the date "to conform to the evidence" to read 1975. This was the ninth amendment made by plaintiffs to their pleadings.

advising him with respect to the protection of his stockholdings. Burlis sought to recover from Kirtz the stock he owned of which Kirtz had fraudulently deprived him. In the present case, there is no allegation nor contention that the Wiggins seized control of Med-Science from plaintiffs, nor could there be, since such control was already in the Wiggins. So, too, the Wiggins and the Kirtzes dealt at arms length with each other, so that the Wiggins owed the Kirtzes no fiduciary duty other than that they would have owed to any minority stockholder. In contrast to *Gieselman,* the Wiggins did not occupy a position of *special* trust and confidence.

Of course, any breach of the fiduciary duty owed by an officer and controlling stockholder to the *corporation* could adversely affect the *value* of the stock owned by the other stockholders. However, if by reason of self-dealing, the Wiggins wrongfully diverted corporate assets to themselves, the wrong was to the corporation and not to plaintiffs individually.[4] And inasmuch as the alleged "wrong" was known to plaintiffs prior to the trial and determination of the value of the minority stock,[5] they had the right and obligation to present the evidence relating thereto *in the state valuation* case if they believed it would serve to enhance the value of their stock. This for the obvious reason that the amount of the allegedly diverted assets for which the Wiggins are claimed to be liable would have been an asset of the corporation to be considered and taken into account in ascertaining the value of the plaintiffs' stock. In this situation

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[4]Plaitniffs have heretofore disclaimed any purpose to state a derivative claim and Count I does not purport to state one.

[5]It is indisputable that plaintiffs knew the fact of the alleged wrongful self-dealing prior to the filing of this suit on May 26, 1976, in view of the fact that their original complaint alleged this conduct and the record in the state court valuation case reflects that the information was known to plaintiffs a substantial period of time prior to the trial of that case, which, as we have noted, did not commence until June 8, 1976.

plaintiffs are precluded from again litigating the issue of valuation under the guise of "fraud." They had their day in court and the opportunity to present whatever evidence they deemed necessary which would tend to enhance the value of the corporate assets and so of their stock holdings.

It appears to be plaintiffs' theory that by charging, as they now do,[6] that the actions of the Wiggins constitute "deceptive or manipulative devices" within the purview of Section 10(b) of the Securites Exchange Act of 1934 (Section 78, 15 U.S.C. and Rule 10b(5) of the Securities Exchange Commission) they will not be subject to the defense of collateral estoppel or res judicata. Be that as it may (and we do not rule that issue), the facts in this case come within the rationale of *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977). Therein the Supreme Court held that a breach of corporate fiduciary duty involving fiduciary self-dealing was not within the purview of Section 10(b). Here, as in *Santa Fe,* the alleged conduct was not "manipulative" within the meaning of the statute. "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market prices." 430 U.S., at 476.

The mere fact, if so, that plaintiffs, as minority stockholders, had not theretofore been told nor were aware of the alleged self-dealing may not be equated with "deceptive practices" or "omissions" in the Section 10(b) sense. As in *Santa Fe,* present plaintiffs were afforded by Missouri law a forum in which (as of the time of the merger) they could recover the fair value of their shares *unaffected by the alleged breach of fiduciary duty* of which they then had knowledge, so that it is entirely appropriate in this instance to relegate (plaintiffs) to whatever remedy is created by state law. In *Santa Fe,* the minority stockholders

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[6]This claim first surfaced after the remand of this case.

wholly failed to pursue their state law remedy. Here, *having utilized that remedy in which they recovered the full actual value of their stock,* plaintiffs may not again litigate that issue (and certainly not for the purpose of again recovering their alleged loss) in a Section 10(b) setting.[6]

Counts II through V, VII, VIII, X and XI, comparably to Count I, allege what plaintiffs perceive to be additional breaches of fiduciary duty and self-dealing on the part of defendants Wiggins. Each of these counts alleges a different act by the Wiggins which in plaintiffs' view operated to divert company assets to them and thereby reduce the book value of the plaintiffs' 28% interest in the corporate stock. Allegedly, in each instance, the facts relating to the alleged misconduct were not discovered by plaintiffs until 1975. We briefly summarize the essential allegations of these counts.

Count II, as amended, alleges without specifics that "note payable to shareholders" in the amount of $40,000 listed in the 1972 and 1973 balance sheets of Med-Science and which were signed by the Wiggins "were made upon fictititous transactions" and that the payment thereof constituted fraud which depleted the cash and net assets of the corporation and (to the extent of 28% of such payments) reduced the value of plaintiffs' stock.

Count III alleges, also without specifics, that the Wiggins "signed checks" for $40,000 "in unearned professional fees," further depleting the cash funds and net worth of Med-Science.

Count IV alleges that defendant Blanton Wiggin, at a shareholders' meeting in August, 1970, by virtue of his majority

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[6]We recognize that plaintiffs are not satisfied with the value of their stock as determined in the state trial and as affirmed by the Missouri Court of Appeals. However, as noted *supra,* the evidence on which they now rely was then known and available to them for use in the determination of value.

stock holding approved the purchase by Med-Science for $15,000.00 of 220 shares of H-T-L Instruments, Inc. "a defunct corporation in the State of Alabama," without disclosing his ownership of the defunct corporation, and that in 1973 those shares were written off as worthless.

Count V alleges that defendants listed on the July 16, 1973 balance sheet of Med-Science a fictitious account in the amount of $21,655 designated "Less allowance for doubtful accounts" sold by it, although there were no doubtful accounts sold by it, the sales having been made by Advanced Instruments (the sales agent owned by defendants), all for the purpose of lowering the cash funds and net worth of the corporation.

Count VII alleges that tax loss carry-overs for the fiscal years 1972 and 1973 were appropriated by the Wiggins' defendants for the benefit of their wholly owned corporation, the facts as to which were discovered by plaintiffs in 1975. The count further alleges that the July 16, 1973 financial statement of Med-Science lists "accumulated depreciation" of property and equipment in the amount of $76,094 (the facts as to which plaintiffs discovered in 1974) and that the property and equipment (machinery and other manufacturing equipment) "are in existence and in use and have full resale value," so that plaintiffs' stock holdings were damaged.

Count X alleges that defendants (Wiggins) maintained for their personal and non-corporate use an automobile at their Massachusetts home during the years 1970, 1971, 1972 and 1973, the costs of which (some $20,000) were paid by Med-Science, although the company had no plant or customers at said location.

Count XI alleges that the "entertainment costs" of $27,000 shown on the 1973 financial statements of Med-Science were expended by the defendant Wiggins for their personal benefit and not for corporate purposes, and so constituted a diversion of corporate funds.

As with Count I, the alleged wrongs alleged in the foregoing counts were to the corporation and not to plaintiffs individually, even though as in every instance in which a corporation is defrauded or its assets diverted, there is (until remedied) an adverse effect upon each of the other stockholders. Our holding as to Count I applies equally to the foregoing counts.

We turn next to the remaining Counts VI, IX, XIII, XIV, XV and XVI. Count VI alleges that during 1973 and thereafter defendants Wiggins refused to supply plaintiffs' agents and attorneys copies of the corporate minutes and financial records of Med-Science, with the result that plaintiffs have paid over $25,000 to a valuation company and to four law firms for their efforts to inspect the records and evaluate the fair market value of plaintiffs' holdings in the corporation. It is obvious that this count pertains to plaintiffs' alleged expenses and attorneys' fees incurred by them in their valuation case. The statute under which that action was brought (Section 351.455 RSMo) makes no provision for payment of such items. And insofar as concerns the right of stockholders to inspect corporate books and records, Section 351.215 RSMo. governs. The sole remedy provided by that statute is the discretionary one of mandamus to obtain the records, together with a penalty of $250. *State ex rel. Watkins* v. *Cassell,* Mo. App. 1956, 294 S.W.2d 647. Plaintiffs have not pursued that remedy nor could they do so in the present action, even ignoring the fact that the matter has long since been mooted. Hence, Count VI, seeking recovery of moneys allegedly expended to obtain the inspection of corporate records wholly fails to state a claim upon which relief can be granted in this action.

Count IX purports to allege a claim for abuse of process in suing out an execution and a writ of garnishment in aid thereof which in some explained manner resulted in plaintiffs losing legal interest on the sum held by the garnishee until it was discharged. The damages sought are the lost interest together with punitive damages.

Although plaintiffs allege in conclusionary language that the execution and the garnishment were "wrongful", no facts are alleged to warrant the use of that term. It is clear under Missouri cases that two of the essential elements of a claim for abuse of process are (1) that the process be employed to accomplish some unlawful end or to compel a party to do some collateral thing which is beyond the scope of the process and (2) an ulterior motive in such process. *Barnard* v. *Barnard,* Mo. App. 1978, 568 S.W.2d 567, 571, pointing out that "(n)o cause of action arises where the process is employed to perform a function intended by law." There is an entire want of any factual allegations that at the time the execution and garnishment were sued out there was no outstanding unpaid judgment or which would show that the purpose of the execution and garnishment was an ulterior or collateral one other than to collect such a judgment. It may well be (as we surmise) that the state court ultimately held that the funds which were garnisheed were jointly owned and so not subject to a garnishment on a judgment against Frank Kirtz alone, but if so, that fact would not mean that defendants had no right to litigate the issue of the ownership of the funds.

Count XII complains of a "fraudulent" notation on the 1972 balance sheet of Med-Science and the re-assertion of such "fraud" in a defendants' exhibit offered in the valuation case. This matter pertains to the effect and validity of a sheriff's return to the effect that he had "seized and sold" 2,500 shares of Med-Science which then stood in the name of Frank Kirtz on the books of the company, although the certificates themselves had not been physically seized by the sheriff but remained at all times in the possession of plaintiffs.[7]

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[7] Under the Missouri law in effect at the time of the levy (Section 513.120 RSMo. 1969) it was not essential that certificates of stocks be physically seized. See *State ex rel North American Co.* v. *Koerner,* Mo. 1948, 211 S.W.2d 698. The Uniform Commercial Code which requires actual, as distinguished from constructive, seizure became effective July 1, 1965, subsequent to the levy.

This precise issue was adjudicated in the valuation case, wherein the state court specifically held that under the evidence presented by the Kirtzes (which defendants were in no position to expressly refute), the certificate for 2,500 shares had been assigned on December 15, 1964 (the date of its issuance to himself and his wife as joint tenants, so that (even though as of October 1, 1971, the date of the levy, the stock was still registered in Frank Kirtz' name alone) the levy was not legally effective to reach these 2,500 shares. On the basis of that finding, plaintiffs were awarded the full value of these 2,500 shares in addition to the value of the other 20,000 shares held by them. Obviously, plaintiffs sustained no recoverable damages simply because the sheriff was found to have been in error in stating that the 2,500 shares had been "seized and sold" as the property of Frank Kirtz.

Count XIII appears to be an "umbrella" count complaining that during 1970, 1971, 1972 and 1973 while defendants Wiggins were practicing the "deceptive manipulative devices" alleged in Counts I, II, III, IV, V, VII, VIII, X and XI (which alleged "deceptively" lowered the "apparent" income of Med-Science), they purchased stock of the company in over 20 transactions[*] and voted that stock for the merger for the purpose of "freezing out" the minority stockholder on a cash-out "book-value" basis less than the actual value of the stock. There is, of course, no contention that any of the over 20 stock purchase transactions of the Wiggins involved purchases from *plaintiffs,* so that they could not have sustained any legal injury. Insofar as plaintiffs are concerned, there was no bar whatever to the right of the Wiggins to purchase stock from whomever was

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[*] There are apparent inconsistencies in the allegations of this count. Obviously, under the allegations of Counts I, II, III, IV, V, VII, VIII, X and XI the Wiggins were not fiduciaries with "insider" information prior to their acquisition of a controlling, majority, interest in Med-Science. Yet plaintiffs plead that the purchase of some 70% of the securities occurred while the Wiggins were "fiduciaries."

willing to sell to them. And whatever may have been the purpose of the merger, plaintiffs made no attempt to prevent it or to set it aside, but instead utilized the provisions of Section 351.435 RSMo. to obtain a court appraisal of their stock. No claim for relief is stated in this Count.

Counts XIV and XV make serious allegations attacking the integrity of Herbert Bryant, an attorney of this bar, charging him with "oppression in office" and abuse of process while acting as Chairman of the Circuit Bar Committee of the Twenty-Second Judicial Circuit which filed the information in the Missouri Supreme Court seeking the disbarment of Frank Kirtz. Plaintiffs allege that Bryant was biased and prejudiced in his conduct of the "proceedings" which resulted in the decision of the Committee to institute the disbarment case in the Supreme Court. Included are allegations to the effect that Bryant, while also allegedly acting as attorney and agent for defendants, sought to purchase plaintiffs' shares at a low, extortionate, figure and that when the offer was rejected, the information was filed, with the result that Frank Kirtz suffered the destruction of his professional reputation and income by reason of his disbarment.

In an affidavit in support of the motion for summary judgment, Mr. Bryant explicitly states that he never acted as attorney or agent for any of the defendants. There is no evidence or showing to the contrary. Instead, plaintiffs make unverified charges that Mr. Bryant is guilty of perjury in so stating. Their contention is based solely on a letter written by Mr. Bryant on January 23, 1973, submitting to an attorney certain information which had been requested by plaintiffs' then (and present) counsel. In that letter, Mr. Bryant stated that at some time *subsequent* to the completion of the proceedings before the Committee in mid-July, 1973, he talked with Mrs. Kirtz to ascertain whether her husband was interested in selling his interest in the company, since a client of his was willing to pur-

chase Wiggins' interest provided such client could also purchase Kirtz' minority interest. Clearly, nothing in this letter substantiates plaintiffs' charge that Mr. Bryant ever acted as attorney or agent for the Wiggins. The contrary is true.

Absent, as here, any relationship of attorney or agent on the part of Mr. Bryant to the Wiggins, nothing he may have done or not done could support a claim asserted by plaintiffs against *defendants.* Nevertheless, we believe fairness to Mr. Bryant requires that we point out certain facts of record as they appear in the opinion of the Missouri Supreme Court in the disbarment proceeding.

Upon the filing of the information, the Court issued its citation to Kirtz which was served upon him notifying him to file a return within 30 days. No return having been filed, the Court then mailed by certified mail, a letter notifying Kirtz that unless he filed a return promptly, the case would be considered a default matter. The letter was returned "unclaimed" and nothing further was done by Kirtz. The opinion of the Court discloses that the usual practice then followed by the Court in disciplinary matters after a responsive pleading was filed was to appoint a special commissioner to hold a hearing, make findings of fact and report the same to the Court. However, in view of the refusal of Kirtz to file a responsive pleading, the Court proceeded with the case upon the information (which was practically a copy of the original charges of misconduct which had been served on Kirtz on February 10, 1972) and the record of the formal hearing held by the Committee. That record consisted essentially of the three volume transcript of the *Gieselman* trial and the opinion of the Supreme Court on appeal of that case, and other documentary evidence. The only live witness who testified before the Committee on the merits of the matter was Kirtz himself. He had also testified in the *Gieselman* trial. The deposition of a local attorney who had been involved (at Kirtz' instance) in the Med-Science matters and which was taken in the *Gieselman* case was also considered by the Supreme Court of

Missouri. Instead of considering the proceeding purely as a default, the Court reviewed all the evidence anew and on the basis of such review came to the same conclusion as to the facts and the law as had been found in its earlier *Gieselman* opinion. Obviously, on this record, Kirtz' disbarment resulted from his own fraudulent conduct and not from any action on the part of Mr. Bryant. However, it is sufficient for present purposes that Mr. Bryant was at no time acting as attorney or agent for defendants. Summary judgment is appropriate on these Counts.

The remaining Count (XVI) constitutes a complaint that although, in accordance with the Missouri merger statute (Section 351.458), defendants had agreed to "promptly" pay the "fair value" of the Kirtz stock, they have failed to do so, even though on May 10, 1979, six days after the valuation decision had become final, demand for payment was made. Aside from the fact that plaintiffs have adequate means for collecting their judgment in the state courts, this claim did not come into existence until some three years after the present suit was filed and we deem it inadvisable to permit plaintiffs to attach to their existing complaint (without advising the Court of their intention to do so) a new claim of this nature.

It is, of course, true that ex parte leave was granted to file the fourth amended complaint. However, an amended complaint must relate to matters that occurred prior to the filing of the original complaint and operates to replace that complaint. If Count XVI is treated (for purposes of this ruling) as a supplemental pleading, it is clear that plaintiffs have not followed the applicable requirements of Rule 15(d) FRCP. That rule authorizes the Court, in its discretion, to permit a party to serve a supplemental pleading "upon reasonable notice [to the other party] and upon such terms as are just." No such notice was given, so that defendants had no opportunity to object to the filing of Count XVI as a supplemental pleading. And since we have found that plaintiffs are not entitled to recover under

Counts I through XV, we deem it inadvisable to permit plaintiffs to litigate an entirely new claim in the original suit. This is particularly true where, as here, all that is necessary is for plaintiffs to execute on their Missouri judgment in the Missouri courts if the judgment has not been paid. Accordingly, we have concluded, in the exercise of our discretion, to strike Count XVI without prejudice.

It follows from the foregoing that judgment should be entered in favor of defendants and against plaintiffs on each of Counts I through XV and that Count XVI should be stricken without prejudice.

Dated this 15th day of January, 1980.

/s/ John K. Regan
United States District Judge

Office-Supreme Court, U.S.
FILED
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CLERK

No. 80-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK GROOM KIRTZ, and MARY JANE KIRTZ,
Petitioners,

vs.

BLANTON WIGGIN, ERMA WIGGIN, ADVANCED INSTRUMENTS, INC., A.I. COMPANY, INC., a/k/a ADVANCED INSTRUMENTS, INC., and H-T-L INSTRUMENTS, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

LASHLY, CARUTHERS, THIES,
RAVA & HAMEL
a professional corporation
EDWARD D. WEAKLEY
714 Locust Street
St. Louis, Missouri 63101
621-2939
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

Petitioners itemize two questions submitted to this Court. In substance, disregarding their allegations concerning the conduct of the Court of Appeals (Petition for Certiorari, pp. 4, 5, and 10), these will be restated as follows:

1. Did petitioners' Fourth Amended Complaint, further amended by interlineation, fail to state a claim for relief.

2. Whether the Courts below properly made adjudications in favor of the respondents directing the dismissal of the complaint.

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STATUTES, REGULATIONS AND COURT RULES INVOLVED

15 U.S.C. §78j. Manipulative and deceptive devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in

contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404 §10, 48 Stat. 891"

17 C.F.R. Section 240.10b-5

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances, under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]"

Rules of the United States District Court for the Eastern District of Missouri, Rule 7. Motions

"(A) Oral Argument or Testimony.

Motions in general shall be forthwith submitted and determined upon motion papers and briefs hereinafter referred to, without oral argument, as soon after filing and submission of briefs as time of the Court permits. The Court may in its discretion order oral argument on any motion."

STATEMENT OF THE CASE

Petitioners' action is an offshoot of litigation first commenced in state court in 1966. The present litigation was filed in the District Court in May, 1976 (Supp. A-2).[1]

The District Court dismissed Petitioners' second amended complaint on procedural grounds (Supp. A-3). On appeal the Eighth Circuit reversed in part and affirmed in part. It held that the counts it reinstated:

"***are subject to the Wiggin's motion to dismiss for failure to state a claim upon which relief can be granted, made as a part of their original motion to dismiss. The district court has not ruled on that motion, and we have not considered the question." (R. App. B - A-9)

The background of this case is best described by the Court of Appeals in its first decision in this case entered December 30, 1977, at footnote 1 (R. App. B - A-3), as follows:

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[1]References to Petitioners' Appendix will be indicated as "A- ", to Petitioners' Supplemental Appendix as "Supp. A- " and references to Respondents' Appendix will be indicated as "R. App. ".

"The present action is one in a long line of legal disputes arising from the Kirtzes' relationship with Med-Science. In *Gieselmann* v. *Stegeman,* 443 S.W. 2d 127 (Mo. 1969), the Supreme Court of Missouri found Frank Kirtz, then a director of the corporation, guilty of fraud and breach of fiduciary duty in issuing and transferring certain shares to himself. In *Gieselmann* v. *Stegeman,* 470 S.W. 2d 522 (Mo. 1971), Kirtz was held liable for receivership expenses incurred by the corporation. These two cases culminated in the disbarment of Kirtz by the Supreme Court of Missouri. *In Re. Kirtz,* 494 S.W. 2d 324 (Mo. 1973). Subsequently, the Kirtzes, as stockholders dissenting from a merger, brought an action in Missouri state court tc recover the fair value of their shares. The Circuit Court for the City of St. Louis found their 22,500 shares to be worth $2.76 per share and awarded them $62,100. *Kirtz* v. *Advanced Instruments, Inc.,* No. 41220-F (Nov. 12, 1976), *appeal pending* No. 39265 (Mo. Ct. App.)" [reported at 581 S.W. 2d 868].

After remand, more amendments to their Complaint were made by Petitioners. The District Court then dismissed Petitioners' claims as set forth in the Fourth Amended Complaint, as amended by interlineation on January 15, 1980 (Supp. A-16). The Court held, among other things that any alleged acts of Respondents which reduced the value of stock owned by Petitioners were known to them at the time of the valuation case in state court, they had the right and obligation to present same at that time, and are now precluded from again litigating this issue of valuation (Supp. A-6, 7).

The Court of Appeals affirmed the order of the District Court on February 5, 1981 on the basis of the lower court's opinion reported as Kirtz v. Wiggin, 483 F. Supp. 148 (D.E.D. Mo. 1980) (A-2).

Rehearing was denied by the Court on February 24, 1981 (Supp. A-1).

ARGUMENT

I. Petitioners Allege That As Minority Shareholders They Were Treated Unfairly By Majority Shareholders In Connection With A Merger. Because Petitioners Had And Exercised The Exclusive Remedy Of Appraisal Of The Fair Value Of Their Shares As Of The Date Of The Merger Under Missouri Corporation Law, Their Claims Are Barred.

Petitioners state that the only question before the Court of Appeals "was whether the petitioners had stated a cause of action upon which relief can be granted" under Rule 10b-5 (17 C.F.R. §240.10b-5) and 15 U.S.C. §78j. (Petition p. 4).

Petitioners filed suit in the state court seeking appraisal of the full value of their shares under the provisions of Missouri law. After trial, petitioners appealed the judgment which was affirmed (Supp. A-3, 4).

Petitioners' claims are barred by the decision of this Court in *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 97 S.Ct. 1292, 51 L. Ed. 2d 480 (1977). That case teaches that there is no violation of Section 10(b) of the Securities Exchange Act (15 U.S.C. §78j) and Rule 10b-5 where a complaint is that a minority stockholder was treated unfairly by a fiduciary in connection with a merger if the plaintiff had the right to invoke a state court remedy to obtain fair value of his shares following such a merger. As is the case here, plaintiffs in *Santa Fe* were minority shareholders who claimed that they were going to receive grossly inadequate price for their shares following the merger, as the result of a fraudulent appraisal of the shares. This Court disallowed that claim.

All of the alleged "wrongs" attributed to respondents were known to petitioners well before the trial of the state valuation case, and were presented by them in that proceeding (Supp. A-6). Under *Santa Fe Industries, Inc.* v. *Green, supra,* petitioners obviously fail to state a cause of action.

II. There Is No Conflict Among The Circuits As To Petitioners' Failure To State A Claim.

Most of the allegations contained in petitioners' complaint are based upon the contention that items appearing in the financial statements and corporate minutes furnished petitioners prior to the trial of the state valuation case, do not characterize the various transactions as petitioners would have them characterized. In other words, they say that the various persons, accountants and corporate entities preparing the documents should have denoted the transactions as "fraudulent" and disclosed what the petitioners speculate was the true motivation of said transactions. Under the securities laws and Rule 10b-5, petitioners are not entitled to have such a characterization. Its absence does not constitute unlawful misrepresentation or nondisclosure, and petitioners have no federal cause of action. *Golub* v. *P.P.D. Corp.*, 576 F.2d 759 (8th Cir. 1978).

To like effect are *Biesenbach* v. *Guenther*, 588 F.2d 400 (8th Cir. 1978); *Popkin* v. *Bishop*, 464 F.2d 714 (2nd Cir. 1972); *Alabama Farm Bureau Mutual Casualty Co., Inc.* v. *American Fidelity Life Insurance Co., etc. et al*, 606 F.2d 602 (5th Cir. 1979); and *Vaughn* v. *Teledyne, Inc.*, 628 F.2d 1214 (9th Cir. 1980).

III. Petitioners Claim Of Denial Of Due Process Is Patently Invalid.

As outlined by the United States Court of Appeals for the Eighth Circuit, petitioners have availed themselves of a long series of litigation in the state courts (R. App. B - A-3).

They have been to the Court of Appeals twice on the present case.

Originally the District Court dismissed their second amended complaint herein, without prejudice, on procedural grounds (R. App. B - A-2).

The Eighth Circuit considered that complaint in detail in its unpublished opinion of December 30, 1977, set forth in respondents' Appendix B.

Again, in the District Court, petitioners continued amending their complaint, finally ending up with a fourth amended complaint, amended by interlineation.

Respondents filed their motion to dismiss for failure to state a claim and for summary judgment. Briefs were filed by both petitioners and respondents. Also before the District Court was the full record in the state valuation case, including the trial transcript (Supp. A.-4). In the discretion of the District Court, oral argument was not held as per Local Rule 7 of the United States District Court for the Eastern District of Missouri.

The care and consideration devoted to the decision of the District Court in dismissing petitioners' complaint is apparent from its Memorandum Opinion (Supp. App.).

On appeal, the record before the District Court, including the trial transcript of the state valuation case, and affidavits in support of the motion to dismiss were certified to the appellate court.

For petitioners to contend a denial of due process or a departure from the accepted and usual course of judicial proceeding flies in the face of the decision of the Eighth Circuit Court of Appeals which held:

> "After oral argument and careful consideration of the records and briefs, we affirm the judgment of the district court on the basis of its well-reasoned opinion. *Kirtz* v. *Wiggin,* 483 F.Supp. 148 (D.E.D. Mo. 1980)." (A-2)

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the court below should be denied.

LASHLY, CARUTHERS,
THIES, RAVA & HAMEL
a professional corporation
Edward D. Weakley
714 Locust Street
St. Louis, Missouri 63101
621-2939

Attorneys for Respondents

APPENDIX

APPENDIX A

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

No. 77-1351

Frank Groom Kirtz, Mary Jane Kirtz,
Appellants,

vs.

Blanton Wiggin, Erma Wiggin,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the said District Court's dismissal of counts I, III, and XII in this cause be and the same is hereby affirmed.

And it is further ordered by this Court that the remaining counts be and are hereby reinstated in this cause for proceedings consistent with this Court's opinion.

December 30, 1977

A true copy.
Attest: Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit. January 27, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1351

Frank Groom Kirtz and Mary Jane Kirtz,
Appellants,

v.

Blanton Wiggin and Erma Wiggin,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: December 24, 1977

Filed: December 30, 1977

Before BRIGHT, STEPHENSON, and HENLEY, Circuit Judges.

PER CURIAM.

The district court dismissed this action, without prejudice, because of the failure of Frank Groom Kirtz and Mary Jane Kirtz, proceeding *pro se,* to cure various deficiencies in their complaint. On this appeal by the Kirtzes, we reinstate the complaint in part.

I.

The Kirtzes, residents of Missouri, were the sole minority stockholders of Med-Science Electronics, Inc., a Missouri corporation, until August 1973, when that company was merged into Advance Instruments, Inc., a Massachusetts corporation.[1] Blanton and Erma Wiggin, residents of Masachusetts, controlled the majority of the stock of both companies and were the directors and officers of Med-Science. The Kirtzes allege that the Wiggins, through various self-dealing transactions and improper accounting devices, diverted corporate funds and fraudulently reduced the book value of Med-Science so that Advance Instruments could purchase the company at less than its true net worth. The Kirtzes, *pro se,* brought this diversity action to remedy the injuries they allegedly suffered because of the Wiggins' actions.

The complaint states thirteen claims. Although it is excessively verbose and rambling, for the most part the complaint is intelligible, with some exceptions noted below.

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[1] The present action is one in a long line of legal disputes arising from the Kirtzes' relationship with Med-Science. In *Gieselmann* v. *Stegeman,* 443 S.W.2d 127 (Mo. 1969), the Supreme Court of Missouri found Frank Kirtz, then a director of the corporation, guilty of fraud and breach of fiduciary duty in issuing and transferring certain shares to himself. In *Gieselmann* v. *Stegeman,* 470 S.W.2d 522 (Mo. 1971), Kirtz was held liable for receivership expenses incurred by the corporation. These two cases culminated in the disbarment of Kirtz by the Supreme Court of Missouri. *In re Kirtz,* 494 S.W.2d 324 (Mo. 1973). Subsequently, the Kirtzes, as stockholders dissenting from a merger, brought an action in Missouri state court to recover the fair value of their shares. The Circuit Court for the City of St. Louis found their 22,500 shares to be worth $2.76 per share and awarded them $62,100. *Kirtz* v. *Advance Instruments, Inc.,* No. 41220-F (Nov. 12, 1976), *appeal pending,* No. 39265 (Mo. Ct. App.).

Count I contains general allegation that the Wiggins, through fraud, conversion, and self-dealing transactions, and in violation of their fiduciary duties, conspired to reduce the assets of Med-Science for the sole purpose of defeating the Kirtzes' rights. The Kirtzes ask for actual damages and for punitive damages of $50,000.

Count II alleges that the Wiggins refused to supply the Kirtzes with financial reports or to allow a firm called Valuation Counsellors, Inc. to inspect the corporate records on behalf of the Kirtzes. The Kirtzes ask for $16,700 actual damages for expenses incurred in hiring Valuation Counsellors and four law firms in their effort to obtain the records necessary to ascertain the value of their Med-Science stock. They further ask for $50,000 punitive damages.

Count III refers to a controversy over the ownership of 2,500 shares of Med-Science stock. The question whether these shares are owned by the Kirtzes or are treasury shares is apparently pending in the action in the Missouri state court. *See* note 1 *supra.* These allegations, however, are so vague and ungrammatical that we cannot discover an intelligible claim in count III.

Count IV alleges that the Wiggins diverted $40,000 of Med-Science assets to themselves by setting up a fictitious account called "Notes Payable to Shareholders" on the corporation's books and then issuing checks to themselves in satisfaction of the notes. These transactions, according to the Kirtzes, reduced the net worth of the corporation by $40,000 and injured the Kirtzes by $11,000, representing their twenty-eight percent share of the $40,000. They ask $11,000 actual damages and $50,000 punitive damages.

Count V alleges that the Wiggins authorized the purchase of 220 shares of H-T-L Instruments, Inc., which subsequently became worthless, and that this transaction constitutes a "self-

dealing" diversion of $15,000 of Med-Science funds. The Kirtzes ask $4,200 actual damages and $50,000 punitive damages.

Count VI alleges that the Wiggins authorized the payment of $5,000 to the widow of a former Med-Science employee. The Kirtzes ask $1,300 actual damages and $50,000 punitive damages.

Count VII alleges that the Wiggins, in a "self-dealing" diversion of corporate funds, obtained an automobile for their personal use paid for by Med-Science. The Kirtzes ask $5,600 actual damages.

Count VIII alleges that the 1973 Med-Science balance sheet fictitiously listed $21,655 as "doubtful accounts" for the sole purpose of reducing the book value of the company. The Kirtzes ask $7,048 actual damages.

Count IX alleges that the 1973 Med-Science financial statement listed $42,885 in fictitious "professional fees" for the sole purpose of reducing the net value of the company. The Kirtzes ask $12,040 actual damages and $50,000 punitive damages.

Count X allages that $140,443 in commissions paid to Advance Instruments in 1973 constituted a self-dealing diversion of corporate funds. The Kirtzes ask $39,200 actual damages and $50,000 punitive damages.

Count XI alleges that the Wiggins, in an abuse of process, willfully and maliciously authorized Med-Science to maintain a wrongful garnishment action against Frank Groom Kirtz, causing him to incur $59,584.20 actual damages.

Count XII contains a general allegation of fraud, breach of fiduciary duty, and diversion of corporate assets. The Kirtzes ask $100,000 punitive damages.

Count XIII alleges that the merger of Med-Science with Advance Instruments was a self-dealing transaction, that Med-Science was purchased at less than its true net worth, injuring

the Kirtzes, and that the Wiggins frustrated the Kirtzes' efforts to ascertain the true value of their Med-Science stock. The Kirtzes further allege that the Wiggins, by incorporating a new Massachusetts corporation with the name Med-Science Electronics, Inc., misappropriated the valuable name of the Missouri corporation. They ask $150,000 punitive damages.

Upon the filing of the initial complaint, the Wiggins filed a motion to dismiss on grounds that the complaint failed to comply with the Federal Rules of Civil Procedure in the following ways: failure to state the grounds of jurisdiction required by Rule 8(a); failure to join Med-Science, Advance Instruments, and its successor, A. I. Company, as indispensable parties under Rule 19; failure to comply with Rule 23, as the complaint contained a class action allegation; failure to state a claim upon which relief can be granted; failure to comply with the Rule 23.1 regarding stockholders' derivative actions. The Wiggins requested, in the alternative, that various "immaterial and scandalous" allegations be struck, that each claim be restated as separate counts as required by Rule 10(b), and that the fraud claims be stated with greater particularity as required by Rule 9(b).

The Kirtzes then filed an amended complaint in which they merely removed the class action allegation and recited allegations appropriate for diversity jurisdiction.

In response to another motion to dismiss, the district court, on December 3, 1976, ordered the Kirtzes to file an amended complaint in accordance with Rules 9(b), 10(b), 12(e), 19(c), 23, and 23.1.

The Kirtzes filed a second amended complaint in which the only change was the relabeling of the paragraphs as "counts."

The Wiggins again moved to dismiss, and the district court, on February 8, 1977, entered an order and judgment dismissing the action, without prejudice, on the ground that the Kirtzes failed to comply with the court's December 3 order.

The Kirtzes then filed a motion to reconsider the judgment dismissing the complaint. The court, in an order dated February 22, 1977, overruled that motion. The Kirtzes then brought this appeal.

II.

After examining the Kirtzes' second complaint, we conclude that the district court erred in dismissing the action as a whole, and we reinstate most, but not all, of the counts. The district court dismissed the action for failure to comply with Rules 9(b), 10(b), 12(e), 19(c), 23, and 23.1[2] We will examine the complaint in light of the requirements of those rules.

Rule 10(b) requires each claim to be stated in a separate paragraph. Although the Kirtzes could have presented their complaint in a more direct and organized fashion, the complaint generally does set forth each claim in a separate paragraph.

Rule 12(e) permits the court to strike a pleading that is so vague or ambiguous that the adverse party cannot frame a responsive pleading. Unless they are mere repetitions of the

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[2] The Kirtzes erroneously believe that the court dismissed the complaint for failure to state a claim. Although the February 22nd order referred to Rule 12(b)(6), the district court did not rely on that rule in dismissing the action. The Wiggins have made a motion to dismiss under Rule 12(b)(6), but the district court has not yet expressly ruled on that motion. Therefore, the question whether the complaint states a claim is not before us on this appeal.

We consider this appeal to be a challenge to the order and judgment of February 8, 1977, dismissing the complaint for failure to comply with the rules listed in the order of December 3, 1976. The judgment of February 8 is a final decision appealable under 28 U.S.C. § 1291 (1970), the time for appeal running from the entry of the February 22 order. Fed. R. App. P. 4(a). Despite the Kirtzes' misunderstanding of the grounds for the dismissal of their action, the Wiggins have briefed, and we review, all grounds on which the district court dismissed the complaint.

charges contained in the other counts, counts I and XII are too vague to permit the defendants to respond to them. The district court correctly dismissed those counts. In addition, count III was properly dismissed as vague and ambiguous. As for the other counts, we conclude that they contain sufficient information to withstand a Rule 12(e) motion.

Because the Kirtzes have deleted their class action allegation, Rule 23 is an inappropriate basis for dismissal.

Rule 9(b) requires that allegations of fraud be stated with particularity. We have already concluded that counts I, III, and XII were properly dismissed on grounds of vagueness. As for the other counts, the Kirtzes describe the alleged fraudulent actions with sufficient particularity to withstand a Rule 9(b) motion. We make no judgment on whether the allegations of fraud make out claims upon which relief can be granted.

Rule 23.1 prescribes the requirements for a shareholder's derivative action. In a shareholder's derivative action, the corporation usually is an indispensable party. Rule 19 requires that such parties be joined in the action or that the plaintiff state why the party is not joined. The district court apparently assumed that the complaint was a shareholder's derivative action despite the Kirtzes' protestations that it was not. We conclude that counts II, XI, and XIII describe conduct by which the defendants allegedly injured the plaintiffs directly. Those contentions are not derivative claims. Counts IV, V, VI, VII, VII, IX, and X could be construed as derivative claims, but each contains allegations of fraud and violations of fiduciary duty that might also be the basis for a direct action under Missouri law:

> Stockholders may maintain an action on an individual basis, as distinguished from a derivative action, against directors, officers, or others for the redress of wrongs constituting a direct fraud upon them, as in the case where wrongdoers by fraud have seized control of the corporation from the complaining stockholders. * * * Another rule

> aids [plaintiff], namely, that which gives to a stockholder to whom an erring director or officer owes a special fiduciary duty the right to maintain an individual action. [*Gieselmann* v. *Stegeman,* 443 S.W.2d 127, 131 (Mo. 1969).]

On their face, those counts purport to be direct, not derivative actions. Moreover, the Kirtzes expressly stated in their memorandum in opposition to the first motion to dismiss that their claims are not derivative. The district court therefore erred in dismissing the complaint for failure to comply with Rules 19 and 23.1. We are expressing no opinion, however, on whether these counts, construed as direct actions, state any claims upon which relief can be granted.

We affirm the district court's dismissal of counts I, III, and XII, and we order reinstatement of the remaining counts. All the reinstated counts are subject to the Wiggins' motion to dismiss for failure to state a claim upon which relief can be granted, made as part of their original motion to dismiss. The district court has not yet ruled on that motion,[3] and we have not considered the question.

III.

We add a caveat. The plaintiffs, who are proceeding *pro se,* should not be judged by the strict standards of attorneys who are admitted into practice before the federal courts. Although plaintiff Frank Groom Kirtz is a disbarred attorney, the pleadings demonstrate that whatever legal skills he possesses do not lie within the realm of federal pleading and practice. The court should allow the Kirtzes some lee-way in stating their claims.

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[3] *See* note 2 *supra.*

On the other hand, litigants who proceed *pro se* are subject to the same rules of procedure and evidence as other litigants. *Hutter Northern Trust* v. *Door County Chamber of Commerce,* 467 F.2d 1075, 1079 (7th Cir. 1972); *Mazique* v. *Mazique,* 356 F.2d 801, 805 (D.C. Cir), *cert. denied,* 384 U.S. 981 (1966); *Carrigan* v. *California State Legislature,* 263 F.2d 560, 564 (9th Cir.), *cert. denied,* 359 U.S. 980 (1959). Moreover, a party proceeding *pro se* is not entitled to waste the court's time with claims totally lacking any legal bases. The Kirtzes' claims, as articulated in their complaint, rest precariously on the outer fringes of cognizable legal theories. The record strongly suggests that they lack the legal skills required to pursue this litigation. Although the Kirtzes have the right to proceed *pro se,* they would be well advised to obtain and follow the advice of legal counsel on both procedural matters and the merits of their claims.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Not to be published.]